FILED
NOV 8 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-648

CITY OF ADAIR, IOWA,

Petitioner,

— v. —

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ALLAN A. HERRICK
2000 Financial Center
Des Moines, Iowa 50309

ROBERT H. HELMICK
2000 Financial Center
Des Moines, Iowa 50309

CURT L. SYTSMA
2000 Financial Center
Des Moines, Iowa 50309

Attorneys for Petitioner

INDEX

PAGE

Citations to Opinions Below 1

Jurisdiction 2

Questions Presented for Review 2

Constitutional and Statutory Provisions 3

Statement of the Case 5

Reasons for Granting Writ 7

CONCLUSION 17

APPENDIX

Court of Appeals Opinion 1a

District Court Opinion 14a

TABLE OF AUTHORITIES

Cases:

Baltimore National Bank v. State Tax Commission of Maryland, 297 U.S. 209 (1936) 8, 12-13

Board of Directors of Red River Levee District No. 1 of Lafayette County, Arkansas v. Reconstruction Finance Corporation, 170 F.2d 430 (8th Cir. 1948) 6

City of Cleveland v. United States, 323 U.S. 329 (1945) 12

Clallum County v. United States, 263 U.S. 341 (1923) 8-9

Colorado National Bank of Denver v. Bedford, 310 U.S. 41 (1940) 12

Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, (1941) 12

Fort Leavenworth Railroad Company v. Lowe, 114 U.S. 525 (1885) 10

Graves v. People of State of New York ex rel. O'Keefe, 306 U.S. 466 (1939) 10

Illinois Central Railroad v. Decatur, 147 U.S. 190 (1893) 9, 14

Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939) 12

Lee v. Osceola Improvement District, 268 U.S. 643 (1925) 11

McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1919) 2.7-9

Mullen Benevolent Corp. v. United States, 290 U.S. 89 (1933) 11

National Bank v. Commonwealth, 76 U.S. (9 Wall) 353 (1869) 10

Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738 (1824) 8

Penn Dairies v. Milk Control Commission of Pennsylvania, 318 U.S. 261 (1943) 12

Pittman v. Home Owners' Loan Corporation of Washington, D.C., 308 U.S. 21 (1939) 12

Railroad Company v. Peniston, 85 U.S. (18 Wall) 5, (1873) 8, 10

Reconstruction Finance Corp. v. R.G. Menihan Corp., 312 U.S. 81 (1941) 12

Rohr Aircraft Corporation v. County of San Diego, 362 U.S. 628 (1960) 13

Swords v. Nutt, 11 F.2d 936 (9th Cir. 1926) 14

Van Brocklin v. State of Tennessee, 117 U.S. 151 (1886) 8

United States Constitution:

Article 1, Sec. 8 11

Tenth Amendment 3

Statutes:

15 U.S.C. §607 13

15 U.S.C. §713a-5 ..... 3, 13, 16

31 U.S.C. §869 (b) 3-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. .....

CITY OF ADAIR, IOWA,

Petitioner,

— v. —

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on August 10, 1976.

Citations to Opinions Below

The opinion of the Court of Appeals sustaining the judgment of the District Court is printed in the Appendix, *infra,* and is reported at 539 F.2d 1185. The District Court opinion is printed in the Appendix, *infra,* and is not reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented for Review

Constitutional Questions

1. In the landmark case of *McCulloch v. Maryland,* the states were expressly assured that the recognition of an implied federal immunity from burdensome interference did not extend any immunity to real property held by a federal corporation; did the Circuit Court err when it ruled that Chief Justice Marshall's express assurance is no longer controlling because it has been "obfuscated" by this Court?

2. Did the Circuit Court err in concluding that the federal government's implied immunity from burdensome interference extends to special assessments, even though it is conceded that such assessments are a payment for benefits received and impose no burden on the property assessed?

3. Is this Court's oft-articulated rule that a federal corporation is not automatically endowed with the privileges and immunities of its creator inapplicable in the case of the Commodity Credit Corporation's asserted immunity from the special assessment levied by the City of Adair?

Statutory Questions

4. As a corporation subject to 31 U.S.C. §869(b), is the Commodity Credit Corporation endowed with a power or privilege which is admittedly not conferred upon it by its Charter Act, to wit, the asserted immunity from special assessments?

5. Did the Circuit Court err in interpreting 15 U.S.C. §713a-5 so as to recognize an implied immunity from special assessments, notwithstanding the Circuit Court's implicit concession that its interpretation is not in accord with the "apparent congressional intent"?

Constitutional and Statutory Provisions

Amendments to the Constitution of the United States of America, Article X:

> The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or to the people.

15 U.S.C. §713a-5 (cited in material part):

> The Commodity Credit Corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the Commodity Credit Corporation shall be

subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. Mar. 8, 1939, c. 44 §5, 52 Stat. 108.

31 U.S.C. §869(b):

(b) No wholly owned Government corporation created by or under the laws of any State, Territory, or possession of the United States or any political subdivision thereof, or under the laws of the District of Columbia, shall continue after June 30, 1948, as an agency or instrumentality of the United States, and no funds of, or obtained from, the United States or any agency thereof, including corporations, shall be invested in or employed by any such corporation after that date, except for purposes of liquidation. The proper corporate authority of every such corporation shall take the necessary steps to institute dissolution or liquidation proceedings on or before that date: *Provided:* That prior thereto any such corporation may be re-incorporated by Act of Congress for such purposes and term of existence and with such powers, privileges, and duties as authorized by such Act, including the power to take over the assets and assume the liabilities of its respective predecessor corporation. Dec. 6, 1945, c. 557, Title III, § 304, 59 Stat. 602.

Statement of the Case

On December 12, 1960, the Commodity Credit Corporation purchased from private citizens and by simple warranty deed certain real estate located within the municipal boundaries of the City of Adair. The City is a rural community in west central Iowa with a population of 650 people. Title to the real estate is in the name of the Commodity Credit Corporation, and the United States has not sought, accepted or otherwise acquired jurisdiction thereover.

On October 2, 1973, the City of Adair adopted a final schedule for special assessments to be levied against the real properties benefited by a 1973 street improvement project. Among those properties was the real estate owned by the Commodity Credit Corporation, and the City of Adair levied a special assessment against the said property in the amount of $5,032.00. Apart from the implied immunity which was subsequently asserted, the validity of this special assessment has not been challenged, and on November 1, 1973, the Commodity Credit Corporation paid the first one-tenth installment of $503.20.

On July 10, 1974, the United States of America brought suit against the City of Adair in the United States District Court for the Southern District of Iowa. The Commodity Credit Corporation was the real plaintiff in interest, and the jurisdiction of the District Court was based upon 15 U.S.C. §714b(c), which states that "[t]he district courts of the United States...shall have exclusive original jurisdiction, without regard to the amount in controversy, of all suits brought by...the Corporation." The Commodity Credit

Corporation sought the return of the previously paid one-tenth installment and a declaration that the entire special assessment is null and void. The City of Adair resisted this claim and filed a counterclaim seeking a declaration that its special assessment is legal and of full force and effect.

No material fact was or is in dispute, and the cause before the District Court was decided on mutual motions for summary judgment. The constitutional and statutory issues were extensively argued and briefed, and, in an opinion filed May 9, 1975, the honorable District Judge W.C. Stuart ruled adversely to the City of Adair. However, his decision was based upon a 1948 Eighth Circuit precedent[1] which the District Court was "constrained to follow" even though there "appear[ed] no indication that the Court in *Red River* underwent an analysis of the burden placed on the government from the imposition of special assessments." Moreover, the District Court ruled that "[i]f this were a case of first impression in the circuit the Court would be inclined to hold the waiver of immunity for the taxation of real estate included the waiver of special assessment imposed on such real estate."

On July 7, 1975, the City of Adair filed its appeal to the United States Circuit Court of Appeals for the Eighth Circuit. The appeal was taken as of right under the provisions of Rule 4(a) of the Federal Rules of Appellate Procedure, and was filed within the 60 day time limitation applicable to an action where "the United States or an officer or agency thereof is a party." The cause was submitted on an agreed statement as the Record on Appeal,

[1] *Board of Directors of Red River Levee District No. 1 of Lafayette County, Arkansas v. Reconstruction Finance Corporation*, 170 F.2d 430 (8th Cir. 1948).

and, after extensive briefs and oral argument, the Eighth Circuit Court rendered the opinion which is the subject of this Petition for a Writ of Certiorari.

Reasons for Granting the Writ

This case presents a number of fundamental questions, the proper resolution of which will have an important impact upon the fiscal standing of local governments throughout the nation, and upon the continued constitutional integrity of our federal system of government. The Circuit Court's answers to these question should be reviewed for the following special and important reasons:

1. The opinion of the Circuit Court overturns a right expressly reserved to state and local governments in the landmark case of *McCulloch v. Maryland*.

The Circuit Court has ruled that the federal government's implied immunity from state and local taxation — an immunity which was first recognized in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1919) — is no longer subject to a limitation expressly articulated by Chief Justice Marshall:

> This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank....

17 U.S. (4 Wheat) at 436. Assuming arguendo that *McCulloch v. Maryland* might otherwise be construed as encompassing an implied immunity from special assessments, the cited passage constitutes Chief Justice

Marshall's express assurance that the City of Adair retains the right to levy a special assessment for the benefits which it has conferred upon the real property of a federal corporation.[1] Moreover, that right is reaffirmed in a long line of distinguised and heretofore unadulterated Supreme Court opinions: *Osborn v. Bank of the United States, 22* U.S. (9 Wheat) 738, 860 (1824); *Railroad Company v. Peniston,* 85 U.S. (18 Wall) 5, 29-30 (1873); and *Van Brocklin v. State of Tennessee,* 117 U.S. 151, 156-57,177 (1886).

The Circuit Court has abandoned the principle of the foregoing precedents for the stated reason that the "principle has been obfuscated" by this Court in *Clallum County v. United States,* 263 U.S. 341 (1923). This reason was advanced even though 1) It is highly unlikely that this Court would, *sub silentio,* obfuscate a landmark precedent of one hundred years standing; 2) the *Clallum County* decision purports to follow the very precedent it has allegedly obfuscated; 3) the decision in *Clallum County* turned upon the inherent war powers of the United States;[2] and 4) the *Clallum County* court expressly refused to

[1] It might be argued, of course, that a wholly owned federal corporation, such as the Commodity Credit Corporation or the Reconstruction Finance Corporation, is constitutionally distinguishable from a national bank on the tax immunity question. However, this Court has recently rejected this very argument. "The suggestion has its force, but force inadequate, we think, to carry to the goal." *Baltimore National Bank v. State Tax Commission of Maryland,* 297 U.S. 209, 212-13 (1936).

[2] "We agree that it [the taxation of property owned by a government agency] 'is not always, or generally, taxation of the means'.... But it may be, and in our opinion clearly is *when* as here not only the agent was created but all *the agent's property was acquired and used, for the sole purpose of producing a weapon for the war*...." 263 U.S. at 344 (emphasis supplied).

consider the proposition for which it is now advanced.[3]

The City of Adair respectfully submits that this Court has not "obfuscated" the rights carefully reserved to state and local governments in *McCulloch v. Maryland.* The Circuit Court's opinion should be reviewed because it is in open conflict with this landmark precedent.

2. The opinion of the Circuit Court is in conflict with the decisions of this Court which establish the principle that the federal government's implied immunity is limited to those exactions which burden its operations and functions.

This Court has long recognized that a special assessment does not burden the property against which it is levied: "[T]o pay for the opening of a street, in a ratio to the 'benefit or advantage' derived from it, is no burden...There is no inconvenience or harship in it...." *Illinois Central Railroad v. Decatur,* 147 U.S. 190, 200 (1893). Moreover, the Circuit Court has conceded that the City of Adair's special assessment is not a burden but is, instead, a mere compensation for benefits conferred upon the property assessed. Nonetheless, the Circuit Court has struck down the City's special assessment for the stated reason that it does not believe that the question of immunity "turns on a determination of the burdensome or beneficial nature of the assessment."

In so doing, the Circuit Court has failed to honor the decisions of this Court which establish that the doctrine of

[3] "It is unnecessary to consider whether the fact that the United States owned all the stock and furnished all the property to the corporation taken by itself would be enough to bring the case within the policy of the rule that exempts property of the United States." 263 U.S. at 345.

implied immunity is a principle which "has its limitation, a limitation growing out of the necessity on which the priniciple itself is founded."

> That limitation is, that the agencies of the federal government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government.

National Bank v. Commonwealth, 76 U.S. (9 Wall) 353, 362 (1869). See also, *Railroad Company v. Peniston,* 85 U.S. (18 Wall) 5, 37 (1873); *Fort Leavenworth Railroad Company v. Lowe,* 114 U.S. 525 (1885).

This long line of landmark opinions is reaffirmed in *Graves v. People of State of New York ex rel. O'Keefe,* 306 U.S. 466 (1939). In this case, the Supreme Court observed that immunity would not be implied unless there was "a burden on the national government tantamount to an interference by one government with the other in the performance of its functions." 306 U.S. at 481. The Court also observed that if no burden is created, "[t]he immunity is not one to be implied from the Constitution, because if allowed it would impose to an impermissible extent a restriction on the taxing power which the Constitution has reserved to the state governments."

The City of Adair respectfully submits that the Circuit Court has severed the doctrine of implied immunity from its constitutional foundation. No other federal court has ever ruled that the federal government's implied immunities

encompass an immunity from special assessments.[4] By extending a principle founded in necessity to an admittedly non-burdensome exaction, the Eighth Circuit Court's opinion has controverted the applicable decisions of this Court. For this reason, that opinion should be reviewed.

3. The opinion of the Circuit Court is in conflict with the decisions of this Court which establish the principle that a federal corporation is not automatically endowed with the privileges and immunities of the United States.

The Circuit Court's opinion goes far beyond the holding that the federal government's implied constitutional immunity encompasses special assessments: The opinion further asserts that the Commodity Credit Corporation is automatically endowed with such immunities, notwithstanding an "apparent congressional intent" to the contrary. This conclusion is in sharp conflict with this Court's oft-articulated rule that immunity in the case of a governmental corporation is not presumed.

Although there is some equivocation in early judicial decisions, the cited rule has been pronounced with increasing vigor by this Court. As the principle was articulated in a 1939 decision,

> Congress may, of course, endow a governmental corporation with the

[4] This Court has, however, recognized an *express* immunity from special assessments in two cases where the United States had acquired jurisdiction over the subject real estate. *Lee v. Osceola Improvement District,* 268 U.S. 643 (1925) and *Mullen Benevolent Corp. v. United States,* 290 U.S. 89 (1933). In both cases, of course, the immunity was not implied, but was expressly grounded upon United States sovereignty over the land. U.S. CONST. Art. 1, Sec. 8.

> government's immunity. But always the question is: Has it done so?

Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 388-89 (1939). See also, *Reconstruction Finance Corp. v. R.G. Menihan Corp.*, 312 U.S. 81, 83-84 (1941).

Even though the Circuit Court's opinion recognizes the validity of this general principle in its application to non-tax immunities and to the taxation of a governmental employee, it has denied the application of that principle to the special assessment levied by the City of Adair. In proferring this distinction, the Circuit Court's opinion is in conflict with *Baltimore National Bank v. State Tax Commission of Maryland*, 297 U.S. 209 (1936). In the cited case, this Court considered the status of property owned by the Reconstruction Finance Corporation. This Court examined the statute which conferred immunity upon that corporation and concluded immunity had not been extended as to the property and tax in question. 297 U.S. at 214-15.[5]

The Circuit Court's opinion openly departs from this Court's oft-articulated rule that tax immunity in the case of a governmental corporation is not presumed. This Court should review that opinion.

[5] This Court has consistently interpreted and applied statutes which grant tax immunities to a federal corporation, and it has just as consistently regarded these statutes as controlling or delineating the scope of the corporation's immunities. See, for example, *City of Cleveland v. United States*, 323 U.S. 329, 333 (1945); *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99 (1941); *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41, 50 (1940); *Pittman v. Home Owners' Loan Corporation of Washington, D.C.*, 308 U.S. 21 (1939); *Penn Dairies v. Milk Control Commission of Pennsylvania*, 318 U.S. 261, 270 (1943).

4. The Eighth Circuit Court's interpretation of the statutory language which confers limited tax immunity upon the Commodity Credit Corporation is in sharp conflict with the Ninth Circuit Court's interpretation; the issue is an important question of federal law which has not been, but should be, settled by this Court.

In material part, 15 U.S.C. §713a-5 provides that the Commodity Credit Corporation shall be exempt from "all taxation" except that "any real property of the Commodity Credit Corporation shall be subject to. . . municipal or local taxation to the same extent according to its value as other real property is taxed." In interpreting this language, the Eighth Circuit concluded that the grant of immunity from taxation *includes* special assessments, while the waiver of immunity for taxation of real estate *excludes* special assessments. Quite apart from its internal inconsistency, this interpretation is in sharp conflict with the established meaning of that language at the time of its adoption.

The language set forth in 15 U.S.C. §713a-5 is substantially identical to the language of 15 U.S.C. §607, which confers tax immunity upon the Reconstruction Finance Corporation. In turn, the language of both statutory provisions is derived or "borrowed from earlier federal legislation dealing with federal financial institutions," including national banking associations, federal reserve banks, federal land banks, and the National Agriculture Credit Corporation.[6]

[6] See *Rohr Aircraft Corporation v. County of San Diego*, 362 U.S. 628, 630 (1960); *Baltimore National Bank v. State Tax Commission of Maryland*, 297 U.S. 209, 214 (1936).

This legislative history is exceedingly important because, at the time the Congress borrowed the statutory language, it had already been judicially determined that such language does not confer, declare or imply any immunity from special assessments. *Swords v. Nutt,* 11 F.2d 936, 936-37 (9th Cir. 1926). The Eighth Circuit's opinion readily admits that "the *Swords* decision is a forceful one for the City's position," and in departing from the interpretation of the Ninth Circuit, the Eighth Circuit Court emphasized the fact that "the *Swords* panel seemed willing to look to apparent congressional intent...." The City of Adair respectfully submits that the Eighth Circuit should have followed the Ninth Circuit's interpretation, thereby giving effect to the apparent congressional intent.

The reasoning of the Court in *Swords v. Nutt* is strongly supported by the well-established presumption that the legislature has acted in accord with reason and common sense. An ordinary tax is a contribution to the general welfare of the sovereign government. On the other hand, a special assessment is very simply a payment by real property for benefits conferred on that property. See *Illinois Central Railroad v. Decatur,* 147 U.S. 190, 197-200 (1893). Accordingly, the interpretation adopted by the Eighth Circuit forces the conclusion that the Congress is willing to make periodic contributions to state and local governments, but that it is not willing to pay for the value of benefits received. If this construction is accepted, the Congress must be made to act like the fool who makes ostentatious gifts to charity but who refuses to pay his bill at the local general store. This construction is illogical, and, accordingly, it is presumptively not in accord with the intent of Congress.

The interpretation adopted by the Eighth Circuit is also unjust. The Commodity Credit Corporation has received over $5,000 in benefits from the City of Adair. Those benefits are in the form of enhanced property value and will be realized in monetary terms upon sale of that property. [As a matter of public knowledge, the Commodity Credit Corporation is now negotiating the sale of the Adair property]. While the Corporation profits, a community of 650 people will be obliged to assume the burden of paying the contractors who have improved the Corporation's property.

If the Congress of the United States were to pass an act imposing a special tax on the citizens of Adair for the support of the Commodity Credit Corporation, there can be no doubt that such legislation would be unjust, inequitable, and probably unconstitutional. If the law honors substance over form, it must be recognized that a grant of immunity from special assessments to the Commodity Credit Corporation would accomplish the same result as the hypothetical special tax. In each case, money would be taken from the citizens of the City of Adair and applied to the benefit of the Commodity Credit Corporation.

Since the Eighth Circuit has candidly admitted that its open departure from the established Ninth Circuit interpretation of the governing statutory language is also a departure from the "apparent congressional intent", the illogic and injustice which the Eighth Circuit's interpretation will foster constitutes a compelling reason why a writ of certiorari should be granted. Moreover, since the charter acts of the vast majority of federal corporations

include language substantially equivalent to 15 U.S.C. §713a-5, the issue is an important question of federal law which has not been, but should be, settled by this Court. This Court should review the Eighth Circuit's opinion.

5. A decision to decline review of the Circuit Court's opinion will have the practical effect of deterring any future assertion of the fundamental rights now advanced by the City of Adair, Iowa.

Since the Circuit Court's resolution of the constitutional and statutory questions presented by this case is logically applicable to the vast majority of federal corporations, its opinion threatens to significantly undermine the ability of local governments across the nation to plan and finance local improvements. However, on a case by case basis, the certain cost of a probable appeal to this Court will effectively deter a local government from attempting to obtain a reversal of the Eighth Circuit's opinion. Since the cost of asserting the right to levy a special assessment will almost invariably exceed the size of that assessment, it is probable that, if review is now declined, the Eighth Circuit's opinion will stand unchallenged for many years to come — regardless of whether that opinion is constitutionally sound, and notwithstanding the justice or injustice of the burden imposed on citizens across the nation who will be forced to pay for the benefits conferred upon the neighboring property of federal corporations.

A decision to decline review of the Circuit Court's opinion will have the practical effect of deterring any future assertion of the fundamental rights now advanced by the

City of Adair, Iowa. Accordingly, this is peculiarly a case where a writ of certiorari should be granted.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

ALLAN A. HERRICK
2000 Financial Center
Des Moines, Iowa 50309

ROBERT H. HELMICK
2000 Financial Center
Des Moines, Iowa 50309

RICHARD G. LANGDON
2000 Financial Center
Des Moines, Iowa 50309

CURT L. SYTSMA
2000 Financial Center
Des Moines, Iowa 50309

November 8, 1976

APPENDIX

APPENDIX

Court of Appeals Opinion

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 75-1608

UNITED STATES OF AMERICA,

Appellee,

— v. —

CITY OF ADAIR, IOWA,

Appellant.

Before BRIGHT and HENLEY, Circuit Judges, and REGAN*, District Judge.

HENLEY, Circuit Judge.

The City of Adair, Iowa, hereafter referred to as the City, appeals from a summary judgment for the United States on the question of the immunity of the Commodity Credit Corporation, hereafter referred to as the CCC, from special assessments levied against its real property located within the City.

The facts are undisputed. Property owned by the CCC is within a special improvement district of the City and the

---

* The Honorable John K. Regan, United States District Judge, Eastern District of Missouri, sitting by designation.

City levied special assessments against property within the district in full compliance with the laws of Iowa. The total assessment against the CCC's property was $5,032.00 and in 1973 the CCC paid the City one-tenth of that amount, $503.20. Subsequently the United States government made demand for a refund and the City refused. The government sued in behalf of the CCC for a judgment of $503.20 plus costs and the City counterclaimed for the balance of the assessment. There were cross motions for summary judgment and the government prevailed.

The district court found for the government on two grounds. First, it found that the laws of the State of Iowa[1] proscribe taxation of property "owned by the United States" and that the property in question is within that category. The court distinguished an earlier decision of the Iowa Supreme Court on grounds that the property in that case, a bridge, was not "owned by the United States" merely because of a federally created bridge commission. *See City of Dubuque Bridge Commission,* 5 N.W.2d 334, *cert. denied,* 317 U.S. 686 (1942).

The second basis for the district court's holding was that the CCC enjoys governmental immunity from special assessments despite a congressionally imposed waiver of

[1] Iowa Code § 391A.2 provides in relevant part:

> Municipalities shall have the power to construct, and repair all public improvements within their limits,...and assess the cost thereof to private property within the municipality....

Section 391A.1(17) defines "private property" as "all property within the district except streets, property owned by the United States and property owned by the municipality."

immunity from property tax.[2] This ruling was based upon the holding in *Board of Directors of Red River Levee Dist. No. 1 of Lafayette County, Ark. v. Reconstruction Finance Corp.,* 170 F.2d 430 (8th Cir. 1948), wherein this court, interpreting language in the Reconstruction Finance Corporation Act identical to that waiving the CCC's immunity from real property tax, held that the waiver did not extend to special assessments. The district court did concede that if it were addressing the question as one of first impression, it would be inclined to extend this congressional waiver of real property taxation to special assessments. The court reasoned that since special assessments are imposed as a result of improvements which have enhanced the value of the property, they are not "burdensome" as are ordinary taxes.

The district court ordered the City to refund the installment paid on the assessment and the City appeals. We affirm.

Immediately it seems that if the district court correctly found that Iowa law does not permit such a special assessment to be levied against the CCC's real property, it is unnecessary to reach the question whether the *Red River* holding is dispositive. However, we note that in their

[2] 15 U.S.C. § 713a-5 provides in part as follows:

> ...The Commodity Credit Corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the Commodity Credit Corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.

Agreed Statement as the Record on Appeal, the parties recognize that if federal law permits such a special assessment, then Iowa law permits it. In *Van Brocklin v. State of Tennessee,* 117 U.S. 151 (1886), the United States Supreme Court discussed similar statutes in other states which proscribe state and local taxation of property "owned by the United States." These provisions were conditions for admission of these states to the union, and the Court noted that they "are equivalent to each other" and that "they are but declaratory, and confer no new right or power upon the United States." 117 U.S. at 167.

We characterize the primary issue in this appeal as being whether the holding in *Red River* is dispositive and find that it is. In that case the levee district, in compliance with Arkansas law, levied an assessment for special improvements against a pipeline owned by the Reconstruction Finance Corporation and filed suit in rem for enforcement of a lien against the RFC's pipeline when the assessment was not paid. The RFC filed a motion to dismiss on grounds that its pipeline property was exempt from special assessments. The district court granted the motion and was affirmed on appeal.

The *Red River* panel reasoned that the state could not tax "property of the United States or any of its instrumentalities" without the consent of Congress. 170 F.2d at 431. It further held that congressional consent to such taxation "should clearly and unequivocally confer the privilege." *Id.* at 433. Determining that the pipeline constituted "real property" within the meaning of Arkansas law, and noting that the Reconstruction Finance Corporation Act exempted the RFC from all state taxation except real

property taxes to the extent that other real property is taxed, this court held that congressional consent to real property taxation did not extend to special assessments.[3] This reasoning was based upon the long recognized distinction between taxation and special assessments, discussed in *Illinois Central R.R. v. Decatur,* 147 U.S. 190 (1893).[4]

The City has submitted several arguments why the holding in *Red River* should not be controlling. Among its contentions are that issues presented to us for consideration were never before the *Red River* panel and, therefore, that decision should set no precedent.

The City further points out that even though the result it urges is the same as that urged by the levee district in *Red River*, the legal theories it relies upon, such as the distinction between taxation and special assessments, were not relied upon by the levee district. We have considered all the arguments submitted by the City as reasons for disregarding *Red River* as precedent and find them unpersuasive.

I.

The City points out that there is a line of authority which existed prior to the holding in *Red River*, but which allegedly was not considered by that panel, to the effect that

[3] After the *Red River* decision Congress amended the Reconstruction Finance Corporation Act to waive the RFC's exemption from special assessments against its real property. 15 U.S.C. § 607.

[4] In *Decatur* the taxpayer was exempt by law from property taxation but was held not to be exempt from special assessments.

governmental immunity is not necessarily implied where Congress has not granted express consent. This line of cases includes *R.F.C. v. Menihan Corp.*, 312 U.S. 81 (1941); *Keifer & Keifer v. R.F.C.*, 306 U.S. 381 (1939); *United States v. Edgerton & Sons*, 178 F.2d 763 (2d Cir. 1949); *Asheville Mica Co. v. Commodity Credit Corp.*, 239 F.Supp. 383 (S.D. N.Y. 1965), *aff'd*, 360 F.2d 931 (2d Cir. 1966), all cited by the City.

The City urges that absent a showing of burden on the United States no immunity will be implied[5] and it asserts that there is no burden on the CCC because the special assessments are levied for improvements or benefits that have enhanced the value of the property. *Illinois Central R.R. v. Decatur, supra.*

None of the foregoing cases directly supports the position that immunity from real property taxation or special assessments should not be implied from the Constitution where Congress has not granted express consent. *Keifer & Keifer, Menihan and Asheville Mica* all concern amenability of government instrumentalities to suit or to the incidents of suit. *Edgerton & Sons* concerned an interpretation of the CCC charter as a Deleware corporation and did not concern immunity from real property taxation or special assessments. *Graves v. N.Y. ex rel. O'Keefe*, 306 U.S. 466 (1939), involved the question of taxation of the income of a federal employee.

[5] In *Graves v. N.Y. ex rel. O'Keefe*, 306 U.S. 466 (1939), the Court found that there was no unconstitutional burden on the federal government for the State of New York to impose an income tax upon an employee of the Home Owners' Loan Corporation who was a state resident, and noted that the principle that the employee's burden is passed on to the government is no longer tenable.

The position that immunity from taxation and special assessments is implied is supported by a number of cases on sovereign immunity from taxation, the first of which was *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *See also, e.g., United States v. Allegheny County*, 322 U.S. 174 (1944); *Mayo v. United States*, 319 U.S. 441 (1943); *Penn Dairies v. Milk Control Com'n.*, 318 U.S. 261 (1943); *Van Brocklin v. State of Tennessee, supra.*

Moreover, congressional consent must be clear, express and affirmative. *See, e.g., United States v. Allegheny County, supra* at 177; *Mayo v. United States, supra* at 448; *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954). And congressional waivers from tax exemptions must be strictly construed. *See Oklahoma v. Barnsdall Corp.*, 296 U.S. 521 (1936). *See also Rohr Aircraft Corp. v. San Diego County*, 362 U.S. 628 (1960), and *R.F.C. v. State of Texas*, 229 F.2d 9 (5th Cir.), *cert. denied*, 351 U.S. 907 (1956).

We do not agree that the question of immunity here turns on a determination of the burdensome or beneficial nature of the assessment. Any authority possessed by the state to tax property owned by the CCC is derived from congressional consent to waive immunity. *Cf. Maricopa County v. Valley Bank*, 318 U.S. 357, 361 (1943). The immunity enjoyed by the United States "grows out of the supremacy of the Federal Government and the necessity that it be able to deal with its own property free from any interference or embarrassment that state taxation might impose." *West v. Oklahoma Tax Commission*, 334 U.S. 717, 723 (1948), citing *McCulloch v. Maryland, supra.*

II.

Also before us and allegedly not considered by the *Red River* panel is whether the CCC's status as a corporation created and owned by the government results in its having different privileges and powers than the government itself and therefore renders its real property amenable to local special assessments in absence of a specific congressional exemption.

It is obvious that generally government corporations do in fact enjoy powers and privileges different from the United States because Congress, in establishing these corporations, limits their powers and privileges in statutes such as the one before us now. Yet the fact that title to property is held in the name of a federal instrumentality instead of in the name of the United States does not alter the doctrine of implied immunity, which can be waived only by congressional consent. *See New Brunswick v. United States*, 276 U.S. 547, 555 (1928); *United States v. City of Milwaukee*, 140 F.2d 286, 288 (7th Cir.), *cert. denied*, 322 U.S. 735 (1944); *United States v. County of San Diego*, 249 F.Supp. 321 (S.D. Cal. 1966).

We find that the *Red River* panel did in fact consider the status of the RFC as a government corporation and properly found implied immunity from special assessments. The opinion interprets the statute governing the exemptions and waivers of exemptions from taxation which Congress had determined for that corporation. Before us now is identical statutory language from which we must determine the very issue before the *Red River* court, and we are not prepared to overrule *Red River* on grounds that the opinion fails to consider the distinction

between the privileges of the United States itself and a corporation created, owned and controlled by it.

We further find no merit in the City's contention that our decision should not follow *Red River* on grounds that the Government Corporation Control Act applies to the CCC but not to the RFC.

III.

The City raises the question whether the tenth amendment to the Constitution prohibits the CCC from claiming immunity from local special assessments against its real property. It argues that the holding in *McCulloch v. Maryland, supra*, which recognized a constitutional immunity from a tax on the operations of the Bank of the United States, acknowledged the right of the state to tax the real property owned by the Bank to the extent that it taxes other real property. This point was also noted in *Osborn v. United States Bank*, 22 U.S. (9 Wheat) 738 (1824); *Railroad Co. v. Peniston*, 85 U.S. (18 Wall) 5 (1873); and *Van Brocklin v. State of Tennessee, supra*.[6]

Admittedly *McCulloch* seems to make clear, in dictum, the principle that a tax on the real property of a government instrumentality is not constitutionally prohibited because it is not a tax on the operations or means of the federal government. This principle has been obfuscated, however,

[6] Even though we reject this argument for other reasons, we note that *McCulloch* and the other cases noting the right of the state to tax the real property of a government instrumentality do not concern the right to levy special assessments, and we point out that the City has emphasized the difference between taxation and special assessments.

in the Supreme Court's holding in *Clallam County v. United States*, 263 U.S. 341 (1923), where county and state taxes on real property owned by the United States Spruce Production Corporation, a wholly owned government corporation created for the war effort, was held to amount to a taxation of the "means" of the government and was constitutionally prohibited. There is language in the opinion pointing out that the corporation existed solely for "producing a weapon for the war," and was "not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account." 263 U.S. at 345. *Cf. New Brunswick v. United States, supra.*

Much like the corporation in *Clallam County*, the RFC receives its money from the government, does not exist for its own profit and is "an agency selected by Government to accomplish purely governmental purposes." *Cherry Cotton Mills v. United States*, 327 U.S. 536, 539 (1946), citing *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524 (1940).

As for the instant case, the nature of the CCC is such that it, like the RFC, exists for a federal purpose. Its purpose is the administration of farm programs and it uses the real property which is the subject of this suit in administration of a farm program. As pointed out by the Supreme Court in *Rainwater v. United States*, 356 U.S. 590 (1958), the CCC is financially dependent upon public funds and all its gains become part of the public treasury. It is so closely controlled in accordance with the Government Corporation Control Act that "little more than a corporate name remains to distinguish it from the ordinary

government agency." 356 U.S. at 592.

In light of the decision in *Clallam County*, we are unwilling to hold that there is tenth amendment protection extending to special assessments against real property owned by government instrumentalities which do not exist for their own profit and whose sole purposes are to carry out federal functions.

IV.

The City relies in part upon *Swords v. Nutt*, 11 F.2d 936 (9th Cir. 1926), in which the court held that a statute similar to the one before us[7] which waived immunity from property taxation for real estate owned by national banks, also waived immunity from special assessments. The court reasoned that congressional intent was to give national banks the power to own property with the "usual incidents of ownership," and that there was no indication that Congress intended to absolve the banks from paying such special assessments. 11 F.2d at 937.

We agree that the *Swords* decision is a forceful one for the City's position. However, we do not overrule *Red River* on the strength of *Swords*. The *Swords* panel perhaps did not

---

[7] The statute, later codified in 12 U.S.C. § 548(a), which has since been amended, read as follows:

> Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

Language in the RFC Act (which was interpreted in *Red River*) was taken from statutes, including this one, governing financial institutions. *Rohr Corp. v. San Diego County*, 362 U.S. 628, 630 (1960).

actually require that the waiver be express, even though it recognized that "national banks are subject to state taxation only as Congress expressly permits." *Id.* at 936. Rather, the *Swords* panel seemed willing to look to apparent congressional intent instead of to express congressional mandate.

The characteristics of a national bank as a government instrumentality differ considerably from those of the CCC. The *Swords* opinion points out that national banks are "[a]t most...instrumentalities or agencies authorized by the United States to be used to aid the government in the administration of an important branch of the public service. (Citation omitted.) But the government has no property interest in them, nor has it control of their activities farther than is declared by general statutes." *Id.* at 937. We note that unlike the CCC, national banks have private shareholders and exist for their own profit. And their employees are not paid by the federal government.

V.

While we affirm the district court's judgment on the basis of this court's holding in *Red River*, unlike the district court we would not reach a different result were we addressing this question as one of first impression. We believe that public policy demands that the immunity of the United States from state interference extends not only to "burdensome" taxation but also to "benefits" conferred without express federal consent.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

District Court Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

CENTRAL DIVISION

CIVIL NO. 74-179-1

UNITED STATES OF AMERICA

Plaintiff and Defendant to Counterclaim,

— v. —

CITY OF ADAIR,

Defendant and Counterclaim

Before Judge W.C. Stuart, District Judge.

The following opinion was filed with the Clerk of the United States District Court for the Southern District of Iowa on May 9, 1975:

On July 10, 1974 the United States commenced this action on behalf of the Commodity Credit Corporation against the defendant City of Adair, Iowa. The United States is seeking to have a special assessment for street improvements against real property owned by the

Commodity Credit Corporation declared null and void, and to recover payment on the assessment made by the Commodity Credit Corporation in the amount of $503.20. The City of Adair filed a counterclaim seeking to have the special assessment declared legal and of full force and effect. On January 9, 1975 the United States moved for summary judgment on their original claim and to dismiss the counterclaim of defendant City of Adair. The City of Adair has resisted the motions by the United States and has moved for summary judgment on their counterclaim. On April 11, 1975 an oral hearing was held on the pending motions.

The jurisdiction of this Court in a suit by or against the Commodity Credit Corporation is provided in 15 U.S.C.A. § 714b(c). The Court has had the opportunity to review the motions by both parties and the supporting material and is of the opinion that the counterclaim filed by defendant City of Adair should be dismissed and that summary judgment should be granted for the plaintiff United States on the original action.

No material factual dispute is presented. The Commodity Credit Corporation has been the owner of the real property in question since December of 1960. On or about October 2, 1973 the City of Adair adopted the final assessment schedule for their 1973 street improvement project. The amount of the assessment against the real property owned by the Commodity Credit Corporation was $5,032. On or about November 2, 1973 the Commodity Credit Corporation paid to the City of Adair one-tenth of the assessment. This partial payment is what the United States is now seeking to recover.

Determination of the legal question involves two separate issues. First, whether Ch. 391A under the assessments were undertaken by the City of Adair grants the City the power to assess the property owned by the Commodity Credit Corporation. Second, whether the Commodity Credit Corporation property is constitutionally immune from municipal special assessments.

Iowa Statute

The street improvement project by the City of Adair was undertaken on the basis of Iowa Code Chapter 391A. The grant of power to municipalities at the time the project was undertaken to assess the costs under that chapter was found in Iowa Code § 391A.2 which states in part: "Municipalities shall have the power to construct, and repair all public improvements within their limits, *** and assess the cost thereof to private property within the municipality as hereinafter provided." The scope of the city's power to assess the costs of these public improvements is limited to the assessment of "private property". The definition of "private property" for chapter 391A is found in section 391A.1(17) which states: "'Private property' means all property within the district except streets, property owned by the United States and property owned by the municipality." The question to be resolved is whether the real property owned by the Commodity Credit Corporation is "property owned by the United States" within the meaning of Iowa law. If the property falls within the exemption, any attempt to assess the property for the street improvements would be invalid as being an act beyond the authority of the City of Adair.

The general exception from taxation and special assessments for property owned by the United States in the Iowa Code traces its origin to the time of Iowa's admission to statehood. See Ch. 91 (1849) Iowa Laws 2d Gen. Assembly. These statutory exemptions were required by Congress as a condition upon every state before admission into statehood. For the condition upon Iowa see Act of March 3, 1845, Ch. 48, § 7, 5 Stat. 742.

The Iowa Supreme Court had the opportunity to interpret the meaning of "property owned by the United States" in *Appeal of City of Dubuque Bridge Commission*, 5 N.W. 2d 334, *cert. denied* (1942), 317 U.S. 686. In *Dubuque Bridge Commission* the Court found that the bridge owned by the City of Dubuque Commission, a corporate entity created by Act of Congress, was not property "owned by the United States". In reviewing the scope of the exception for property owned by the United States the Court said:

> ***the fact that the legal title is not in the name of the United States of America does not disqualify the bridge from exemption which may be granted. The mere name of the federal instrumentality or agency, if its property were such, would not matter if it is actually Federal property***. *Id.* at 343.

The Court in *Dubuque Bridge Commission* found from the nature of the federally created bridge commission that the bridge was not government property.

The Commodity Credit Corporation is an ongoing and federally funded corporate body used to achieve a federal

goal. By its charter act it is made an "agency and instrumentality of the United States". 15 U.S.C.A. § 714. This wholly owned corporate body of the United States is quite unlike such entities as bridge commissions and railroads chartered by the United States to achieve a purpose with property neither owned by the government nor financially contributed to by the government. In reaching the decision that the bridge was taxable under Iowa law the Iowa court in *Appeal of City of Dubuque Bridge Commission, supra,* relied on the fact that the bridge was in "no part contributed to by the Federal government". *Id.* at 345. As distinguished from the bridge, the property of the Commodity Credit Corporation is government property. The Commodity Credit Corporation is so entwined with the federal government that the conclusion that must be drawn is that the property of the Commodity Credit Corporation is "federal" property within the meaning of the exemption from assessment under Iowa law. The property in question falls within the prohibition for "property owned by the United States" and not the proper subject of assessment by the City of Adair.

Immunity

The second issue presented is that of immunity of the Commodity Credit Corporation property from taxation. In *McCulloch v. Maryland* (1819), 17 U.S. (4 Wheat.) 316, 425, 437, the United States Supreme Court held that the United States and its agencies; including corporations chartered by it, are immune from certain types of taxation by states or their subdivisions. Since that decision, tax immunity has remained a field apart from other questions of

immunity. The recent trend starting with ***Keifer & Keifer v. Reconstruction Finance Corporation*** (1939), 306 U.S. 381 has not affected the area of tax immunity. The doctrine of ***Keifer & Keifer*** was clarified in ***Reconstruction Finance Corporation v. J.G. Menihan Corporation*** (1941), 312 U.S. 81, 84, where the Court stated: "Recognizing that Congress may endow a govermental corporation with the government's immunity, we found the question to be 'Has it done so?' That is, immunity in the case of a governmental agency is not presumed." In *Graves v. New York ex rel. O'Keefe* (1939), 306 U.S. 466 decided one month after ***Keifer & Keifer*** the United States Supreme Court showed clearly that the traditional concept of inherent tax immunity remained unchanged when the stated:

> As [the federal] government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxations. (Citations omitted) And when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself.*** *Id.* at 477.

Thus, any immunity in the field of taxation would attach to the Commodity Credit Corporation because it is engaged in governmental functions.

Congress has the power to waive any immunity which the Commodity Credit Corporation would have as a governmental corporation. *Graves v. New York ex rel O'Keefe, supra* at 478; *Van Allen v. the Assessors* (1865), 70 U.S. (3 Wall.) 573, 583-587. Congress has acted in the area of waiver of immunity for the Commodity Credit Corporation. On taxation of the Commodity Credit Corporation 15 U.S.C.A. § 713a-5 states in part:

> ***The Commodity Credit Corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority, *except that any real property of the Commodity Credit Corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.*

The question thus becomes whether the defendant's special assessment for street improvements falls within § 713a-5. At least since *Illinois Central Railroad v. Decatur* (1893), 147 U.S. 190 the Courts have recognized a distinction between "taxation" and "special assessments". In *Illinois Central* it was held that an exemption of the railroad company from taxation is to be construed as an exemption from the

burden of ordinary taxes and not from special assessments for local improvements. The Eighth Circuit recognized this distinction in *Board of Directors of Red River Levee District No. 1 v. Reconstruction Finance Corporation* (8th Cir., 1948), 170 F. 2d 430, 432-433. Thus, it appears from that case that the special assessment does not fall within the meaning of "taxation" in 15 U.S.C.A. 713a-5.

When Congress has been silent on the waiver of taxation immunity the courts must decide whether the tax in question is covered by the intergovernmental immunity. In *Graves v. New York ex rel O'Keefe, supra* at 479-480, the United States Supreme Court stated as follows:

> It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. ***But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. ***It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears there is no ground for implying a constitutional immunity, there is

> equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.

The Court must decide whether the special benefit added assessment imposes such a burden upon the federal government as to give rise to a constitutional immunity from the local tax. This analysis is almost identical to that used in *McCulloch v. Maryland, supra.* When C.J. Marshall found the granting of state power to tax the operation of the bank would entail the imposition of an intolerable burden upon the federal government.

The City of Adair urges that the Tenth Amendment requires a finding that there exists no immunity from the power of the state to tax the real property. The Tenth Amendment states that all powers not delegated to the United States and not prohibited to the states by the Constitution shall be reserved to the states. The powers granted to the United States by the Constitution have been read to include not only those which are expressly stated but also those that must arise by implication. Although not expressly stated the power of immunity from burdensome state taxes or conversely the prohibition of state imposition of burdensome taxes on the federal government has been implied to exist. *The Railroad Company v. Penniston* (1873), 83 U.S. (18 Wall.) 5 the Court stated:

> There are, we admit, certain subjects of taxation which are withdrawn from the power of the States, not by any direct or express provision of the Federal Constitution, but they may be regarded as necessary implications. They grow out of our

> complex system of government, and out of the fact that the authority of the National government is legitimately exercised within the States. ***[T]he States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National government. ***But it is often a difficult question whether a tax imposed by a State does in fact invade the domain of the general government***. It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons or property. ***The states are, and they must be, coexistent with the National government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. *Id.* at 30-31.

Hence the Constitution must be given a practical construction to define the powers and prohibitions referred to in the Tenth Amendment. The test of whether the special assessment immunity is present is the same test as set out in *Graves v. New York ex rel. O'Keefe*—whether the assessment imposes an undue burden.

Special assessment proceeds on the theory that the land adjacent to the improvement which is assessed will be enhanced in value by the presence of the improvement. The assessment is viewed as being compensation to the local authority for the enhanced value of the property. *Illinois*

Central Railroad v. Decatur, supra, at 198. Using this benefit added theory as the basis for the special assessments the argument that the assessment poses an undue burden upon the federal government is far from compelling. In return for the assessment the landowner receives the immediate benefit of the improved street and more importantly the value of the property is enhanced. At the time of sale the assessment is recouped by means of the increased value of the property. The conclusion that the assessment poses an undue burden becomes harder to reach in view of the Congressional consent to *ad valorem* real property taxes. 15 U.S.C. 713a-5. For the payment of the *ad valorem* taxes the landowner receives only the benefit of general community services, they return no special benefit to the property of the taxpayer.

The Ninth Circuit in *Swords v. Nutt* (9th Cir., 1926), 11 F.2d 936 faced a similar problem involving special assessments of national banks. The property of the national banks at the time were subject to property taxes "to the same extent, according to its value, as other real property is taxed". *Id.* The Court in finding the special assessments valid first reviewed the nature of the special assessment and then stated:

> Nothing is found in the national legislation on the subject to justify the conclusion that Congress, in granting to national banks authority to own real estate, intended to absolve such property from the burdens imposed by state authority upon like lands within its domain, or that such land should be exempt from assessment for local improvements, which will add to its value an amount equal to the assessment, or that the lands of national banks should be enhanced in value at the expense of other landowners within an improvement district.

If this were a case of first impression in the circuit the Court would be inclined to hold the waiver of immunity for the taxation of real estate included the waiver of special assessment imposed on such real estate. However, this Court does not feel free to make such decision in light of the decision of the Eighth Circuit in *Board of Directors of Red River Levee District No. 1 vs. Reconstruction Finance Corporation, supra.* In *Red River* the Eighth Circuit interpreted language in the charter act of the Reconstruction Finance Corporation identical to that in § 713a-5 for the Commodity Credit Corporation and found immunity from special assessments for local improvements. The nature of the Reconstruction Finance Corporation was very similar to that of the Commodity Credit Corporation in that both performed ongoing functions as wholly owned government corporate bodies.

There appears no indication that the Court in *Red River* underwent an analysis of the burden placed on the government from the imposition of the special assessments. Rather it appears the Eighth Circuit assumed that special assessments were immune unless Congress consented to their imposition. *Id.* at 433. Nonetheless with the similarity in the charter acts and the functional nature of the two corporations this Court feels constrained to follow the view of the Eighth Circuit and hold the Commodity Credit Corporation is immune from special assessments for local improvements.

As a special assessment for local improvements the street improvement assessment against the real property of the Commodity Credit Corporation is void. A lien placed against the real property of the Commodity Credit Corporation as a result of the attempted but void assessment is ineffective and void. *Mullen Benevolent Corporation v. United States* (1933), 290 U.S. 89, 95.

The United States Supreme Court in *Wisconsin Central Railroad v. United States* (1896), 164 U.S. 190, 210, 212, recognized the right of the United States to recover funds paid over by mistake. The Eighth Circuit in *Stone v. United States* (8th Cir., 1961), 286 F. 2d 56, 68-69, held that the Commodity Credit Corporation had the right to recover funds paid by it under error of law or error of fact. Therefore,

IT IS HEREBY ORDERED that the motion for summary judgment on the counterclaim by defendant City of Adair is denied and that the motion to dismiss the counterclaim by the plaintiff United States is granted.

IT IS FURTHER ORDERED that the motion for summary judgment by the plaintiff United States on the original claim is granted.

Signed this 8th day of May, 1975.

/s/ W.C. Stuart

W.C. Stuart, U.S. District Judge
Southern District of Iowa

Supreme Court, U. S.
FILED
JAN 21 1977
MICHAEL RODAK, JR., CLERK

No. 76-648

In the Supreme Court of the United States

OCTOBER TERM, 1976

CITY OF ADAIR, IOWA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

EDMUND B. CLARK,
JACQUES B. GELIN,
MICHAEL A. MCCORD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-648

CITY of ADAIR, IOWA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 539 F. 2d 1185. The opinion of the district court (Pet. App. 14a-26a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered August 10, 1976. The petition for a writ of certiorari was filed November 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a city may levy a special assessment on real property of the Commodity Credit Corporation under 15 U.S.C. 713a-5, which exempts the corporation from all

taxation, except that state and local governments may tax its real property "to the same extent according to its value as other real property is taxed."

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article VI, par. 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 5 of the Act of March 8, 1938, 52 Stat. 108, 15 U.S.C. 713a-5, provides in pertinent part:

> The Commodity Credit Corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the Commodity Credit Corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.

STATEMENT

The undisputed facts of this case are set forth in the opinion of the court of appeals (Pet. App. 1a-3a). The Commodity Credit Corporation (CCC) is a corporate instrumentality and agency of the United States, within

the Department of Agriculture, which purchases and sells surplus agricultural commodities.[1] It is wholly owned by the United States. Commodity Credit Corporation Charter Act, Sections 2, 7, 62 Stat. 1070, 1072, as amended, 15 U.S.C. 714, 714e. By statute it is exempt from "all taxation" by federal, state and local governments "except that any real property of the * * * Corporation shall be subject to State, Territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed." 15 U.S.C. 713a-5.

In 1973, the City of Adair, Iowa (hereinafter "the City"), a municipal corporation of the State of Iowa, levied a special assessment for a street improvement project against certain real property owned by the Commodity Credit Corporation (CCC) located within the municipal boundaries of the City. The total assessment against the property of CCC was $5,032.00, and CCC initially paid the City one-tenth of that amount—$503.20. Subsequently CCC demanded that the one-tenth installment be refunded, but the City refused. The United States then brought suit on behalf of CCC to have the special assessment levied against CCC's property declared null and void and to recover the $503.20 already paid to the City. The City counterclaimed for the balance of the assessment.

On cross motions for summary judgment, the district court entered judgment for the United States. It relied on two distinct grounds. First, it concluded that the property of the CCC was property "owned by the United States" within the meaning of the applicable law of the State of Iowa and, therefore, that the City was prohibited by state law from levying a special assessment against the property (Pet. App. 16a-18a). Secondly, it concluded that the property of CCC

---

[1] See *Rainwater* v. *United States*, 356 U.S. 590, 591-592.

was constitutionally immune from state and local taxation, and that special assessments are not generally applicable real estate taxes to imposition of which Congress expressly consented in 15 U.S.C. 713a-5.

On the City's appeal, the court of appeals affirmed the judgment of the district court on the basis of its prior decision in *Board of Directors of Red River Levee Dist. No. 1 of Lafayette County, Ark.* v. *Reconstruction Finance Corp.*, 170 F. 2d 430 (C.A. 8).

ARGUMENT

The scope of the Commodity Credit Corporation's immunity from state and local taxes is expressly defined by statute, which bars imposition of "all taxation" except state and local taxes imposed on its real property "to the same extent according to its value as other real property is taxed." 15 U.S.C. 713a-5. We submit, therefore, that the only issue properly presented for review is whether a special assessment is a real property tax permitted by the terms of this statute. The court of appeals correctly resolved that issue on the basis of its earlier decision in *Board of Directors of Red River Levee Dist. No. 1 of Lafayette County, Ark.* v. *Reconstruction Finance Corp.*, 170 F. 2d 430 (C.A. 8).

That case involved a provision of the Reconstruction Finance Corporation Act that "exempted the RFC from all state taxation except real property taxes to the extent that other real property is taxed * * *" (Pet. App. 4a-5a). When a levee district attempted to impose a special assessment for certain improvements specifically benefiting a pipeline owned by the Reconstruction Finance Corporation, the Eighth Circuit held that the special assessment was not a tax to the extent that other real property is taxed, and hence was not within the provision of the Reconstruction Finance Corporation Act permitting state taxation of the RFC's real property.

Petitioner recognizes the distinction between generally applicable real estate taxes and special assessments, since it argues (Pet. 14) that "[a]n ordinary tax is a contribution to the general welfare of the sovereign government. On the other hand, a special assessment is very simply a payment by real property for benefits conferred on that property. See *Illinois Central Railroad* v. *Decatur*, 147 U.S. 190, 197-200 * * *." It contends, however, that because special assessments benefit rather than burden property, the statute permitting imposition of real estate taxes on CCC should be construed as consenting to the imposition of special assessments. It is well established, however, that a special assessment on property owned by the United States, or by its instrumentalities for the benefit and use of the United States, may not be imposed by state or local governments absent congressional consent. *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89; *Lee* v. *Osceola Improvement District*, 268 U.S. 643, 645. Such a rule is necessary to prevent local governments from undertaking special improvements in the expectation that a substantial part of the cost will thereafter be recovered in the form of special assessments against federal instrumentalities. This principle of immunity applies without regard to the actual burden or benefit on federal functions. Such factors are taken into account only when the constitutional tax immunity of the United States is invoked derivatively by agents of the federal government such as employees and contractors. For example, in *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, the Court held that a state could tax the salary of an employee of a federally created corporation, despite a claim of inter-governmental immunity, because the tax fell solely on the employee and was not "in form or substance a tax upon the * * * Corporation or its property or income, nor is it paid by the corporation or the government from their funds." *Id.* at 480. See also *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 117-118; *United States* v. *Allegheny County*, 322 U.S. 174, 176-177; *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 149.

Swords v. *Nutt*, 11 F. 2d 936 (C.A. 9), is not to the contrary. That case held that a statute that waived immunity from property taxes for real estate owned by national banks also waived immunity from special assessments. But as the court of appeals pointed out (Pet. App. 12a), the national banks are essentially private organizations operated for their own profit under a federal charter, not federal instrumentalities wholly owned by the United States, like CCC. In addition, it is well established that congressional consent to state and local taxation of federal properties and functions must be clear, express and affirmative. *Kern-Limerick, Inc.* v. *Scurlock, supra*, 347 U.S. at 122; *United States* v. *Allegheny County, supra*, 322 U.S. at 177; *Mayo* v. *United States*, 319 U.S. 441, 446-448. For example, after the decision in *Red River Levee Dist., supra*, Congress amended the Reconstruction Finance Corporation Act to provide expressly that "any real property of the Corporation shall be subject to special assessments for local improvements * * *." 61 Stat. 205, 15 U.S.C. 607. In contrast, however, no similar provision has been adopted for the Commodity Credit Corporation.

Petitioner has set forth a number of arguments based upon the constitutionality of the *implied* tax immunity of the Commodity Credit Corporation as a federal instrumentality. Because of the express provisions of 15 U.S.C. 713a-5, however, it is unnecessary for the Court to reach these constitutional issues.[2] *Agricultural Bank* v. *Tax*

[2]Petitioners have not directly challenged the constitutionality of 15 U.S.C. 713a-5, nor could they do so in view of this Court's decisions recognizing that even without an express statute, properties, functions and instrumentalities of the United States are immune from state and local taxation, without congressional consent. *McCulloch* v. *Maryland*, 4 Wheat. 316, 436; *United States* v. *Allegheny County*, *supra*, 322 U.S. at 176-177; *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261, 269.

Commission, 392 U.S. 339, 341.[3] In any event petitioner's contentions are foreclosed by a long series of decisions concerning the immunity of federal corporate instrumentalities. See *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 102; *Pittman* v. *Home Owners' Loan Corp.*, 308 U.S. 21, 32-33; *Van Brocklin* v. *State of Tennessee*, 117 U.S. 151, 180.[4] Since the real property in the instant case was held by CCC solely for the benefit and use of the United States, and CCC is a federally created corporation wholly owned and controlled by the United States, it follows that the property was constitutionally immune from state and local taxation, including special assessments, absent congressional consent.

[3]*Agricultural Bank* involved a claim that national banks were no longer entitled to tax immunity as federal instrumentalities because the subsequent establishment of the Federal Reserve System deprived them of the unique quality concerning the currency which had given them the character of a federal instrumentality. The Court held that their immunity survived because the express language of 12 U.S.C. 548 "marks the outer limit within which States can tax national banks." *Id.* at 345.

[4]The petitioner relies (Pet. 8) primarily upon three decisions in making its argument that the real property of a federally created corporation is not immune from state and local taxation: *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Railroad Co.* v. *Peniston*, 18 Wall. 5; *Van Brocklin* v. *State of Tennessee*, *supra*. But in the *Van Brocklin* decision the Court explained the holdings in *Osborn* and *Peniston* by drawing a distinction between property owned by an agent, which agent was itself *not* wholly owned by the United States, and property owned by the United States. The Court indicated that the property of such an agent was not immune from taxation unless the tax fell on the means employed by the United States. 117 U.S. at 156-157, 177.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
ActingSolicitor General.

PETER R. TAFT,
Assistant Attorney General.

EDMUND B. CLARK,
JACQUES B. GELIN,
MICHAEL A. MCCORD,
Attorneys.

JANUARY 1977.

DOJ-1977-01